

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

STATE OF CONNECTICUT and the
GENERAL ASSEMBLY OF THE STATE OF
CONNECTICUT,

Plaintiffs,

V.

MARGARET SPELLINGS, SECRETARY
OF THE DEPARTMENT OF EDUCATION,

Defendant.

Civil No. 3:05-cv-01330 (MRK)

December 2, 2005

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	4
I. Statutory Background	4
II. Factual Background	9
ARGUMENT	14
I. The Court Lacks Jurisdiction Over the State’s Pre-Enforcement Challenge to the Secretary’s Interpretation of the NCLB	14
A. The State May Not Evade the Statute’s Mandatory Review Procedure by Bringing a Pre-Enforcement Challenge	14
B. The State’s Claims Are Not Ripe	19
II. Plaintiffs Lack Standing and Have Failed to State a Claim Because the State’s Alleged Expenses Are Not Attributable to the NCLB’s Conditions of Assistance	23
III. Even if the State’s Alleged Expenses Were Attributable to the NCLB’s Conditions of Assistance, Plaintiffs Have Failed to State a Claim	29
A. Section 7907(a) Would Not Excuse the State of Connecticut from Compliance with the NCLB’s Conditions of Assistance	29
1. The State’s Interpretation of § 7907(a) Conflicts With the Plain Language of § 7907(a)	29
2. The State’s Interpretation of § 7907(a) Conflicts With Other Provisions of the NCLB	34
3. The State’s Interpretation of § 7907(a) Would Undermine Congressional Intent	38
B. The Secretary May Constitutionally Enforce the NCLB’s Conditions of Assistance	41
1. The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Spending Clause	42

2.	The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Tenth Amendment	48
IV.	The Secretary's Exercise of Discretion in Denying the State's Waiver Requests Is Not Subject to Judicial Review	51
CONCLUSION		55

INTRODUCTION

The No Child Left Behind Act of 2001 (“NCLB” or “the Act”), which amended the Elementary and Secondary Education Act of 1965 (“ESEA”), carries forward a longstanding and noncontroversial principle: states and local school districts that seek federal financial assistance must comply with the conditions that come with that assistance. In particular, the NCLB requires states to administer high-quality yearly academic assessments, which are used to determine whether students in each grade and in each specified subgroup are making adequate yearly progress in obtaining improved academic achievement. This requirement is critical to implementing the core operating principle of the NCLB, i.e., academic accountability.

In 2002, the State of Connecticut (“the State”) gave its unqualified assurance that it would comply with the NCLB’s conditions of assistance, and has since received more than \$750 million in federal funds based on that pledge.¹ Now, on the eve of the deadline for implementing one of the central conditions of the Act, the State² seeks – first through a set of waiver requests, and now through this lawsuit – to keep the funds while jettisoning the accompanying obligations. Claiming that the State would have to spend its own money to fulfill its promises, the State seeks, not a mutual release from the federal-state partnership envisioned by the NCLB, but a one-sided release wherein the federal government continues to provide the same level of federal assistance to Connecticut regardless of whether the State meets the NCLB’s conditions.

As a preliminary matter, the State’s claim is before the wrong court at the wrong time. The State has not failed to comply with the NCLB’s conditions of assistance; accordingly, the

¹ See See <http://www.ed.gov/about/overview/budget/statetables/index.html> (“State Tables by Program” link). The amount Connecticut has received for Title I, Part A of the ESEA, the program at issue here, is more than \$400 million. See id.

² For the sake of simplicity, Defendant refers to the Plaintiffs collectively as “the State.”

Secretary has taken no steps to enforce these conditions against the State. Were the Secretary to take steps to enforce the conditions through the withholding of program funds, Congress has determined that any challenge to the Secretary's action must first proceed through a comprehensive administrative review process, and then go directly to the United States Court of Appeals for the Second Circuit. By bringing a pre-enforcement challenge, the State seeks to circumvent this carefully crafted review scheme. Moreover, given the clear benefits in this case of developing a record through the administrative review process, and given that any withholding of program funds would be stayed pending the Court of Appeals' consideration, the State's claim is not ripe for adjudication.

A second threshold problem with the State's suit is that the expenses at issue do not stem from the obligations that the State seeks to avoid. The State asks to be released from the obligation to administer qualifying assessments to students in grades 3, 5, and 7; but the State's own Complaint demonstrates that it is the State's decision to reject a less expensive form of testing, rather than the assessment requirement itself, that would necessitate the State's expenditure of its own funds. The State asks to be released from the obligation to test disabled students at grade level; but the State acknowledges that the expenses it has identified would stem, not from the requirement of grade-level testing, but from the State's decision to implement modified-standard assessments for disabled students. The State asks to be released from the obligation to test students with limited English proficiency ("LEP students") during their first three years of schooling in the United States; but according to the State's Complaint, the relevant expenses would not result from the first three years of testing, but from an option to translate LEP students' assessments into foreign languages. The fact that the State's expenses result from

wholly voluntary undertakings, rather than any obligations of the NCLB, defeats not only the State's substantive claims but its standing to bring those claims.

Even if the State's claims were properly before this Court, and even if its anticipated expenses were attributable to the NCLB's requirements, each of the State's three claims would fail. The first claim – that 20 U.S.C. § 7907(a) effectively negates the NCLB's conditions of assistance if compliance with those conditions would involve the expenditure of State funds – is based on a fundamental misreading of the statute. As another United States District Court recently held, the plain language of § 7907(a) establishes that the provision was intended to prevent federal officers or employees from adding unfunded mandates to the conditions imposed by Congress, not to excuse states from their voluntary decision to comply with Congress's conditions in exchange for federal funds. The provision's plain language is bolstered by the presence of other NCLB provisions that expressly *require* states to spend their own funds in order to obtain federal assistance, as well a provision that requires states to develop state assessments even if federal funding for that purpose falls below a specified level. The State's interpretation not only ignores § 7907(a)'s language and other provisions within the statute; it ignores the fact that the central purpose of the NCLB is to assist the states in discharging what is primarily a state and local responsibility, namely, helping students to become proficient in reading and mathematics. Additionally, the State's interpretation would thwart Congress's intent to hold states and school districts that accept federal funds accountable for achieving improved educational results.

The State's second claim – that requiring the State to comply with the NCLB's conditions of assistance in order to obtain federal funding violates the Spending Clause and the

Tenth Amendment if compliance would involve the expenditure of State funds – is equally unavailing. This claim is based on the premise that the State was unaware, when accepting federal funds, that it would be required to comply with the statutory conditions of assistance. Given the unambiguous statutory language requiring compliance – including language that expressly addresses the states’ obligations if federal funding were to fall below a certain level – the State’s premise is untenable. Compliance with the statute’s conditions is unquestionably a prerequisite to federal assistance, and the State received more than \$750 million in federal funds based on its unqualified pledge that it would comply with them.

The State’s third claim – that the Secretary’s denial of the State’s waiver requests was “arbitrary and capricious” – is non-justiciable. The State may not invoke the Administrative Procedure Act to obtain judicial review of agency actions that are committed to agency discretion by law. Congress has left the decision to grant or deny a waiver request entirely to the Secretary, and the NCLB provides no guidelines for how the Secretary should exercise her discretion. Moreover, the decision to grant or deny a waiver involves complex questions of educational policy that are peculiarly within the agency’s expertise; it therefore constitutes the type of discretionary decision that is traditionally exempt from judicial review.

BACKGROUND

I. Statutory Background

The Elementary and Secondary Education Act of 1965 (“ESEA”) creates a voluntary federal-state partnership in the area of elementary and secondary education. States that choose to participate may obtain federal funding in return for agreeing to meet various requirements

designed to enhance the quality of public education and to further the academic achievement of students. See 20 U.S.C. § 6301 et seq.

The NCLB, enacted on January 8, 2002, is a comprehensive education reform package that amends the ESEA. The purpose of the NCLB is to improve the education of elementary and secondary school students by, *inter alia*, “granting unprecedented new flexibility to local school districts” while at the same time “demanding results in public education through strict accountability measures.” H.R. Rep. No. 107-63(I), at 265 (2001). The “centerpiece” of the NCLB “is academic accountability.” Id. at 281. The NCLB “holds States, local educational agencies, and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards.” Id.

Title I of the ESEA, as amended by the NCLB, contains several programs geared toward boosting the educational achievement of disadvantaged students. At issue in this lawsuit is Title I, Part A, which is intended to improve basic programs operated by local educational agencies. See 20 U.S.C. § 6311 et seq. State and local educational agencies may use the federal funds available under Title I, Part A “only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.” 20 U.S.C. § 6321(b)(1).

To receive a grant under Title I, Part A, a state must submit a plan developed by the state educational agency. See 20 U.S.C. § 6311(a). Each state plan consists of three primary elements. First, the plan must demonstrate that the state “has adopted challenging academic content standards and challenging student academic achievement standards that will be used by

the state, its local educational agencies, and its schools to carry out” the requirements of Part A. 20 U.S.C. § 6311(b)(1)(A). While these standards must satisfy certain general criteria, see 20 U.S.C. § 6311(b)(1)(D), states are afforded the flexibility to design their own standards, which need not be submitted to the Secretary for approval. See 20 U.S.C. § 6311(b)(1)(A).

Second, each state plan must show that “the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress.” 20 U.S.C. § 6311(b)(2)(A). The definition of the term “adequate yearly progress” (“AYP”) is largely subject to the state’s discretion, but must be based on a statistically reliable method of measuring student progress based on academic assessments developed by the state. See 20 U.S.C. § 6311(b)(2)(C)(ii), (iv). In addition, the state’s definition must include “separate measurable annual objectives for continuous and substantial improvement” for all public elementary and secondary school students and for certain subgroups of students, including economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. See 20 U.S.C. § 6311(b)(2)(C)(v). A school or district will be considered to have made AYP if each of the subgroups meets the objectives set by the state, see 20 U.S.C. § 6311(b)(2)(I); alternatively, if a given subgroup does not meet the annual objective, a school or district can make AYP if, inter alia, the percentage of students in the group measuring “below proficient” on the state assessments decreased by at least 10 percent from the preceding school year. See 20 U.S.C. § 6311(b)(2)(I)(i).

Third, each state plan must show that the state “has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science .” 20 U.S.C. § 6311(b)(3)(A). Assessments in mathematics and reading or language arts must be administered to all students in grades 3 through 8. See 20 U.S.C. § 6311(b)(3)(C)(vii). The state may choose the assessments that it uses to measure proficiency, but the assessments must be aligned with the state’s academic standards as well as “relevant, nationally recognized professional and technical standards,” and “the same academic assessments [must be] used to measure the achievement of all children.” 20 U.S.C. § 6311(b)(3)(C)(i)-(iii). The states were required to have developed and implemented many of these assessments under the NCLB’s predecessor legislation. See Pub. L. No. 103-382, § 1111(b)(3), 108 Stat. 3518 (1994). All required assessments in math and reading/language arts not already in place must be administered beginning in the 2005-2006 school year, see 20 U.S.C. § 6311(b)(3)(C)(vii), while all required assessments in science not already in place must be administered beginning in the 2007-2008 school year. See 20 U.S.C. § 6311(b)(3)(C)(v)(II).

To help states and local school districts comply with these and other conditions of assistance under the NCLB, Congress has increased significantly the amount of federal funding available to supplement the states’ own fiscal efforts. Since 2001, appropriations for Title I grants have increased by 45 percent, from \$8.76 billion to \$12.74 billion. See 114 Stat. 2764-65; 115 Stat. 180; 118 Stat. 3142-43, 3348. The NCLB also provides funds to assist states in developing and administering the assessments used to measure student progress. See 20 U.S.C. § 7301-7301b. At the time of the NCLB’s enactment, Congress specified that states would be

temporarily excused from the requirement of implementing assessments (but not the requirement of developing them) if federal funding did not meet specified levels:

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of [the NCLB] is less than:

- (i) \$370,000,000 for fiscal year 2002;
- (ii) \$380,000,000 for fiscal year 2003;
- (iii) \$390,000,000 for fiscal year 2004; and
- (iv) \$400,000,000 for fiscal years 2005 through 2007.

20 U.S.C. § 6311(b)(3)(D). In fact, congressional appropriations have met or exceeded these amounts. From 2002 to 2005, Congress appropriated approximately \$1.5 billion for grants to aid states in developing and administering assessments: \$387 million in 2002 (see 115 Stat. 2202-03), \$387 million in 2003 (see 117 Stat. 328), \$391.6 million in 2004 (see 118 Stat. 257), and \$400 million in 2005 (see 118 Stat. 3144).

The NCLB allows the Secretary, at her discretion, to grant waivers from many of the Act's requirements. In order to receive consideration, a state's waiver request must include certain information, including a description of how waiving the requirement in question will increase the quality of instruction for students and improve their academic achievement. See 20 U.S.C. § 7861(b). The Secretary may then decide whether to grant or deny the waiver, see 20 U.S.C. § 7861(a), except that the Secretary may not waive certain specified requirements, e.g., the requirement that states maintain their own fiscal effort and use federal funds only to supplement, not supplant, non-federal funds. See 20 U.S.C. § 7861(c). Waivers may be granted for a period of four years or less; after the expiration of that period, the Secretary may renew the waiver "if the Secretary determines that – (A) the waiver has been effective in enabling the State

or affected recipient to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement; and (B) the extension is in the public interest.”

20 U.S.C. § 7861(d)(2).

The Act also limits the ability of federal officials and employees to impose requirements and costs on the states and localities beyond those imposed by Congress. To this end, the Act contains a provision that states:

GENERAL PROHIBITION. Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction or allocation of State or local resources or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

20 U.S.C. § 7907(a). This language was carried forward from the NCLB’s predecessor legislation. See Pub. L. No. 103-382, 108 Stat. 3518, 3906 (1994); Pub. L. No. 103-227, 108 Stat. 125, 186 (1994).

II. Factual Background

Since 1985, Connecticut has had in place a system of statewide assessments in reading, writing, and mathematics administered to public school students in grades 4, 6, and 8. See Complaint ¶ 47. These assessments were consistent with the requirements established by the ESEA prior to enactment of the NCLB, and Connecticut opted to participate in, and receive grants under, the ESEA. See Complaint ¶ 18.

As set forth at Part I, supra, the NCLB amended the ESEA in 2002 to require yearly testing of all students in grades 3 through 8 as one of the conditions for receiving federal funds. See 20 U.S.C. § 6311(b)(3)(C)(vii). Connecticut opted to continue its participation and to apply

for federal grants under the Act. As part of its consolidated state application, filed in 2002 and supplemented in 2003, Connecticut made the following representations:

Section 10-14n of the Connecticut General Statutes requires all students in the public schools in Grades 4, 6, 8 and 10 to participate in the state assessments. Students in Grades 3, 5 and 7 will also be included in the state assessments starting with the 2005-06 school year.

Effective September 2003, all LEP [“limited English proficiency”] students except for those students in their first academic year of enrollment in a U.S. school, will participate in the state assessments, with or without accommodations, and their results will be included in the State Accountability System.

See Connecticut’s June 9, 2003 Consolidated State Application Accountability Workbook, at 28, 44 (available at www.ed.gov/admins/lead/account/stateplans03/ctcsa.pdf). Based on these and other representations contained in Connecticut’s application, the Department of Education provided Connecticut with \$104.1 million in federal grants under Title I, Part A in FY 2002; \$106.5 million in FY 2003; \$109.1 million in FY 2004; and \$107.5 million in FY 2005. See <http://www.ed.gov/about/overview/budget/statetables/index.html> (“State Tables by Program” link). In addition, since 2002, Connecticut has received \$22.38 million in federal funding to assist in meeting the assessment requirements. See id. Because Connecticut already tests all students in Grades 4, 6, and 8, and because these assessments conform to the statute’s requirements, Connecticut’s primary additional obligation with respect to assessments (and the primary purpose of the \$22.38 million federal allotment) was to develop and implement testing for grades 3, 5, and 7.

In January 2005, with the deadline for administering assessments to students in grades 3, 5 and 7 approaching, Connecticut sought a waiver from this requirement, claiming that it was

expensive and unnecessary. See Complaint ¶ 59. The Secretary denied this request by letter dated February 28, 2005. See Complaint ¶ 64. The letter stated in part:

The significance of [yearly] assessments cannot be underestimated. For students, every year of school is important as each year builds on what was learned before. We must be able to identify strengths and weaknesses and, for the sake of students, we cannot do that infrequently. You cannot remedy weaknesses you do not know about.

National data further show why annual testing is important. Overall, Connecticut's students are doing fine. But beneath the averages, Connecticut's achievement gap is wider than the national average. According to the 2003 National Assessment of Educational Progress assessments black and Hispanic fourth graders in Connecticut performed 37 and 32 points lower, respectively, in reading than white students. The eighth grade gaps were nearly identical. In eighth-grade math, black and Hispanic students scored 38 and 34 points lower than their white peers. These results clearly point to a problem, but additional detail about the progress (or lack thereof) in student achievement is needed. NCLB will provide that information by requiring States to test students in each of grades three through eight and once in high school.

We must measure annually and in each grade to determine if these gaps are being closed, and, if they are not, adjustments must be made. For these reasons, we will not waiver in the implementation of the NCLB annual testing provisions.

See Letter from Secretary Spellings to Commissioner Sternberg of 2/28/05, at 1 (available at www.state.ct.us/sde/nclb/Correspondence/index.html).

The State renewed its waiver request on March 31, 2005. See Complaint ¶ 68. The Department of Education responded by suggesting that Connecticut could administer multiple-choice assessments for grades 3, 5, and 7, which would be significantly less expensive but would still meet the requirements of the NCLB. See Complaint ¶ 73. Connecticut responded that “assessments limited to multiple-choice questions would amount to a ‘dumbing down’ of the tests – and this is something we will not do.” Letter from Sternberg to Spellings of 4/22/05, at 1 (available at www.state.ct.us/sde/nclb/Correspondence/index.html). By letter dated May 3,

2005, the Secretary reiterated that the Department of Education would not grant a waiver of the testing requirement, and suggested other sources of federal funding to assist Connecticut in meeting its obligations. See Complaint ¶ 76; Letter from Spellings to Sternberg of 5/3/05, at 1-2 (available at <http://www.state.ct.us/sde/nclb/Correspondence/index.html>).

In addition to requesting a waiver from the requirement of testing students in grades 3, 5, and 7, Connecticut requested a waiver to exempt students with limited English proficiency (“LEP” students) from testing for a period of three years after entering the U.S. school system. See Complaint ¶ 59. The achievement gap between LEP students and non-LEP white students in Connecticut in 2002-2003 ranged from 44 to 81 points (depending on the grade level and subject matter of the test) – a fact that Connecticut was obliged to report publicly under the statute.³ See <http://www.ed.gov/about/reports/annual/nclbrpts.html> (link to “Appendix A”). The Secretary responded to the waiver request by informing Connecticut that the Department of Education would soon implement regulations codifying the Department of Education’s interim policy (set forth at <http://www.ed.gov/news/pressreleases/2004/02/02192004.html>) of allowing LEP students an adjustment period of one year after entering the U.S. school system before being required to take the reading/language arts tests. In the meantime, Connecticut could take

³ Title I, Part A requires states and local educational agencies to make certain information regarding their schools’ performance available to the public. In particular, states and local educational agencies must prepare annual report cards that include information on student achievement on the state’s academic assessments, disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, as well as information providing a comparison between the actual achievement of each group of students and the state’s annual measurable objectives for each group. See 20 U.S.C. §§ 6311(h)(1)(C), 6311(h)(2)(B). Local educational agencies are required to make the information contained in the report cards “widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies.” 20 U.S.C. § 6311(h)(2)(E).

advantage of the interim policy. See Letter from Spelling to Sternberg of 2/28/05, at 2 (available at www.state.ct.us/sde/nclb/Correspondence/index.html). Connecticut renewed its request on March 31, 2005. The Secretary responded: “[T]his summer the Department is establishing a working group to exchange information on LEP students and NCLB. Until the Department finishes reviewing the issue, the current policy [*i.e.*, a one-year phase-in for “recently arrived” LEP students] will continue.” Letter from Spellings to Sternberg of 6/20/05, at 3 (available at www.state.ct.us/sde/nclb/Correspondence/index.html).

Connecticut also submitted requests for waivers that would permit the state to test disabled students at lower grade levels than their actual grade. See Complaint ¶¶ 59(c) & 74. Testing the majority of disabled students at grade level had revealed an achievement gap ranging from 41 to 51 points (versus non-disabled white students) in 2002-2003. See <http://www.ed.gov/about/reports/annual/nclbrpts.html> (link to “Appendix A”). The Secretary denied these requests by letter dated June 20, 2005. The Secretary noted that students with the most significant cognitive disabilities could be held to alternate achievement standards, and that other types of flexibility were available to accommodate disabled students. See Letter from Spellings to Sternberg of 6/20/05, at 2 (available at www.state.ct.us/sde/nclb/Correspondence/index.html). In addition, in May of 2005, the Secretary announced that the agency would soon promulgate regulations allowing states to implement a regime of alternate assessments based on modified achievement standards for certain disabled students beyond those with the most significant cognitive disabilities (up to 2% of all students), and that some aspects of the new policy would be implemented during the interim period. See Complaint ¶ 70;

<http://www.ed.gov/news/pressreleases/2005/05/05102005.html>;

<http://www.ed.gov/policy/elsec/guid/raising/disab-options.html>. The State requested and received permission to implement the interim flexibility measures. See Complaint ¶ 79.⁴

ARGUMENT

I. The Court Lacks Jurisdiction Over the State's Pre-Enforcement Challenge to the Secretary's Interpretation of the NCLB

This Court lacks jurisdiction over the State's claims. As discussed further below, the State seeks to challenge the Secretary's enforcement of certain statutory requirements before the Secretary has taken any enforcement action. This pre-enforcement challenge represents an impermissible end-run around the mandatory administrative and judicial review scheme set forth in the governing statute. Furthermore, in light of both the lack of any imminent or certain penalty and the advantages of withholding judicial consideration pending a final agency enforcement action, the case is not ripe for review.

A. The State May Not Evade the Statute's Mandatory Review Procedure by Bringing a Pre-Enforcement Challenge

The State's lawsuit challenges the Secretary's authority to enforce the requirements of the NCLB against the State where doing so would require the State to spend its own funds. In fact, however, given that the State is still in compliance with the NCLB's requirements, the Secretary has not yet taken any of the enforcement actions available to her under the statute. See

⁴ The State also requested a waiver to allow the State to measure the achievement of groups of students based on those students' progress over time. See Complaint ¶ 59(b). As recently reported in the Washington Post, the Secretary intends to consider such requests from Connecticut and other states as part of a pilot project to explore the feasibility of growth models as accountability mechanisms. See Some States Get Break on Student Progress, Wash. Post, Nov. 19, 2005, at A9; see also www.ed.gov/print/news/pressreleases/2005/11/11182005.html.

20 U.S.C. § 1234c (setting forth options for enforcement where “the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds”). The Secretary’s denial of Connecticut’s waiver requests simply leaves the preexisting statutory requirements in place; it does not constitute an enforcement action, nor could any such action be initiated at this time given that the deadline for implementing the requirements in question has not yet passed.⁵ Cf. Asbestec Construction Services, Inc. v. United States Environmental Protection Agency, 849 F.2d 765, 768-69 (2^d Cir. 1988) (challenge to EPA’s compliance order, which imposes no new obligations but simply requires the subject to “comply with the law,” constitutes a “pre-enforcement” challenge).

The Supreme Court has held that courts may not entertain pre-enforcement challenges where the governing statute requires parties aggrieved by enforcement proceedings to proceed through a specified administrative and judicial review process. In Thunder Basin v. Reich, 510 U.S. 200 (1994), a mine operator sought pre-enforcement review of a certain Mine Act regulation, claiming that it would be irreparably harmed if it complied with the regulation and that it faced serious civil penalties if it did not. The Court noted that, “[i]n cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is fairly discernible in the statutory scheme.” Thunder Basin, 510 U.S. at 207 (internal quotation marks and citation omitted). Analyzing the Mine Act, the Court found that “the Mine Act’s comprehensive enforcement structure, combined

⁵ Grade-level testing of all students in grades 3 through 8, including disabled students and LEP students, must occur at some point during the 2005-2006 school year. See 20 U.S.C. § 6311(b)(3)(C)(vii).

with the legislative history's clear concern with channeling and streamlining the enforcement process, establishes a fairly discernible intent" to preclude judicial review outside the administrative and judicial review scheme specified in the statute. The Court concluded that permitting pre-enforcement review would "allow mine operators to evade the statutory-review process," and that the Mine Act therefore "precludes district court jurisdiction over the pre-enforcement challenge made here." Id. at 207, 215, 216.

The "comprehensive enforcement structure" set forth in the Mine Act, which the Court found to preclude pre-enforcement judicial review, is similar in all relevant respects to the enforcement structure that applies here, *i.e.*, Subchapter IV of the General Education Provisions Act ("GEPA").⁶ Specifically:

- Both statutes require the agency to provide notice of an alleged violation of statutory or administrative requirements. See 30 U.S.C. § 814(a) (Mine Act); 20 U.S.C. § 1234d(b) (GEPA).
- Both statutes then provide for a hearing before an Administrative Law Judge ("ALJ"). See 30 U.S.C. § 823(d) (Mine Act); 20 U.S.C. § 1234d(c) (GEPA).
- Subject to discretionary review and reversal/remand by the Federal Mine Safety and Health Review Commission (Mine Act) or the Secretary (GEPA), the ALJ's decision (or the discretionary review thereof) becomes the "final decision"/"final agency action." 30 U.S.C. § 823(d) (Mine Act); 20 U.S.C. § 1234d(f) (GEPA).

⁶ GEPA establishes the procedures for the Secretary's enforcement of the requirements of federal grant programs over which she has authority, including ESEA. See 20 U.S.C. § 1234 *et seq.* The withholding of program funds, which is the enforcement action identified by the State in this case, see Complaint ¶¶ 31-36, would be governed by the provisions of GEPA. The NCLB contains a separate provision for the withholding of funds for state administration. See 20 U.S.C. § 6311(g)(2); see also 20 U.S.C. § 6304(a) (states may set aside the greater of \$400,000 or 1% of the funds allocated for Title I programs for state administration).

- The aggrieved party may then challenge the final decision/action in the appropriate United States Court of Appeals. See 30 U.S.C. § 816(a)(1) (Mine Act); 20 U.S.C. § 1234g(a)-(b) (GEPA).
- The Court of Appeals must uphold the agency's factual findings if supported by substantial evidence. See 30 U.S.C. § 816(a)(2) (Mine Act); 20 U.S.C. § 1234g(c) (GEPA).
- The agency may not implement the enforcement action until the court has completed its review. See 30 U.S.C. §§ 816 & 820(i) (Mine Act); 20 U.S.C. § 1234g(a) (GEPA).
- Neither statute “distinguish[es] between preenforcement and post-enforcement challenges.” See Thunder Basin, 510 U.S. at 207-08.

In sum, both statutes create a comprehensive process of administrative review, through which “agency expertise [is] brought to bear” on the issues raised, Thunder Basin, 510 U.S. at 215, followed by review in the United States Court of Appeals with substantial deference to the agency's factual findings. Faced with this degree of similarity between other statutory review schemes and the Mine Act, Courts of Appeals have held that Thunder Basin is controlling and that the statutes necessarily preclude pre-enforcement challenges. See, e.g., National Taxpayers Union v. United States Social Security Admin., 376 F.3d 239, 242-43 (4th Cir. 2004) (no pre-enforcement review under Social Security Act); Great Plains Coop v. Commodity Futures Trading Comm’n, 205 F.3d 353, 355 (8th Cir. 2000) (no pre-enforcement review under Commodity Exchange Act); In re Establishment Inspection of Manganas Painting Co., 104 F.3d 801, 803 (6th Cir. 1997) (no pre-enforcement review under Occupational Safety and Health Act).⁷

⁷ The Court in Thunder Basin also examined the legislative history of the Mine Act, and found that this history “confirm[ed]” the Court's interpretation of the statute. Thunder Basin, 510 U.S. at 209. As the Fourth Circuit has noted, the Court relied primarily on the text and structure of the Mine Act and did not suggest “that specific legislative history is necessary to conclude that Congress intended to preclude initial judicial review.” National Taxpayers Union v. United States Social Security Admin., 376 F.3d 239, 243 n. 2 (4th Cir. 2004). Nonetheless, the

Any doubt as to whether judicial review may occur outside the applicable statutory framework is erased by Bell v. New Jersey and Pennsylvania, 461 U.S. 773 (1983). In that case, the Supreme Court faced a threshold question regarding the point at which a party may obtain judicial review of the Secretary's enforcement of ESEA Title I requirements. The Court noted that jurisdiction stemmed from § 455 of the GEPA⁸ (the predecessor to 20 U.S.C. § 1234g); that there exists a "strong presumption . . . that judicial review will be available only when agency action becomes final"; and that each of the GEPA's provisions pertaining to administrative review of enforcement action "includes a subsection dealing with finality and suggesting that only a 'decision' of the [agency] is subject to review." Bell, 461 U.S. at 778. Id. The Court concluded that, in the absence of an appealable collateral order, "the federal courts may exercise jurisdiction *only* over a final order of the Department [of Education]." Id. (emphasis added). In other words, until the administrative review procedure has run its course and a final enforcement order has issued, no judicial review is available.⁹

legislative history of the GEPA's review provisions – like the legislative history of the Mine Act – evinces a "concern with channeling and streamlining the enforcement process." Thunder Basin, 510 U.S. at 216. For example, the House Report states that the review provision was intended to "consolidate[] most of the provisions relating to enforcement and judicial review in existing state-operated programs, and . . . establish[] a comprehensive system for enforcement by the [agency] of the requirements relating to education programs." H.R. Rep. No. 95-1137, at 141 (1978).

⁸ The Court recognized an alternative source of jurisdiction in § 195 of the ESEA, which has since been repealed. See Bell, 461 U.S. at 777.

⁹ No statutory review framework exists for the withholding of funds for state administration under 20 U.S.C. § 6311(g), as opposed to the withholding of Title I program funds under 20 U.S.C. § 1234d. See footnote 5, supra. The State appears to base its standing to seek review on the potential withholding of program funds. See Complaint ¶¶ 31-36. To the extent the State also relies on the potential withholding of state administration funds, while the statute itself would not preclude judicial review of a challenge to such withholding, any such challenge would not be ripe at this time. See Part I.B., infra.

B. The State's Claims Are Not Ripe

The Court lacks jurisdiction over the State's pre-enforcement challenge for an additional reason: the State's claims are not ripe. A primary purpose of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). Even if jurisdiction exists, "it should not be exercised unless the case 'tenders the underlying . . . issues in clean-cut and concrete form.'" Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972) (quoting Rescue Army v. Municipal Court, 331 U.S. 539, 574, 584 (1947)). In determining whether an issue is ripe for adjudication, courts examine "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." National Park Hospitality Assoc. v. Dept. of the Interior, 538 U.S. 803, 808 (2003). The fitness of issues for judicial resolution depends on whether the case presents purely legal issues or whether it would "benefit from further factual development," Whitman v. American Trucking Ass'ns, 531 U.S. 457, 459 (2001), and on whether there has been a "final agency action." Abbott Labs., 387 U.S. at 149-50.

In Abbott Laboratories v. Gardner, the Supreme Court delineated the circumstances under which a pre-enforcement challenge may be ripe for judicial review. In that case, a group of drug manufacturers sought to challenge a final regulation promulgated by the Secretary of Health, Education, and Welfare. The regulation required drug manufacturers to put certain information on prescription drug labels; drug companies that failed to comply would be subject to "serious criminal and civil penalties" for the "misbranding" of drugs. Abbot Labs., 387 U.S. at 153. The only question presented by the drug manufacturers' challenge was a legal one:

whether the regulation was a correct interpretation of the statutory provision it was intended to implement. See id. at 149. After determining that the Federal Food, Drug, and Cosmetic Act did not preclude judicial review, see id. at 139-48, the Court addressed the question of ripeness. The Court found that the issue was fit for judicial resolution, both because it presented a purely legal question and because the regulation was a “final agency action,” having been “promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties.” Id. at 151. With respect to the harm of postponing consideration, the Court also found that “the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review.” Id. at 152.

As a preliminary matter, Abbott Laboratories does not suggest an “exception” to the rule of Thunder Basin (discussed at Part I.A., supra). The question of whether a pre-enforcement challenge is ripe for review is separate from, and secondary to, the question of whether the statute permits such review. The Court in Abbott Laboratories turned to ripeness only after ascertaining that the special review procedures contained in the Federal Food, Drug, and Cosmetic Act were facially inapplicable and that the statute expressly contemplated the application of remedies outside the Act. See Abbott Labs., 387 U.S. at 139-48 (citing statute’s “saving clause,” which stated that “[t]he remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law”). The Court in Thunder Basin distinguished Abbott Laboratories on that basis. See Thunder Basin, 510 U.S. at 212. Accordingly, even if this case were ripe for review, the existence of a mandatory administrative and judicial review procedure in the GEPA would preclude review by this Court at this time.

In fact, however, this case is not ripe for judicial resolution under the Court's analysis in Abbott Laboratories. In contrast to the drug manufacturers' challenge in Abbott Laboratories, which presented a purely legal question, the State's claims present both legal and factual issues. The threshold question is a legal one: whether the NCLB excuses states from compliance with applicable conditions of assistance if states would be required to spend their own funds in order to comply. See Part III.A, infra. If the NCLB does not excuse compliance, the State has no claim. If the reviewing court were to find that the NCLB *does* excuse compliance, however – i.e., if the legal issue were resolved in the State's favor – a highly complex factual question would be raised: whether the amount of federal funding provided is sufficient to enable the State to satisfy the annual testing requirements. This question would require not only a searching examination into the spending choices made by the State and the available alternatives, but also an understanding of the interaction between educational policy and pragmatic budgetary considerations. It cannot seriously be doubted that this question would benefit from further factual development and from application of the agency's expertise during the statutorily prescribed administrative review process, which would take place as a matter of course (see Part I.A., supra) following any attempt by the agency to initiate enforcement action under 20 U.S.C. § 1234c. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (even where “an allegedly injurious event is certain to occur,” a court may properly “delay resolution . . . until a time closer to the actual occurrence of the disputed event when a better factual record might be available”).

A second distinction between this case and Abbott Laboratories is the nature of the agency action challenged. In Abbott Laboratories, although no enforcement action had been

taken, the agency had promulgated a final regulation which created substantive obligations on the part of drug manufacturers. This regulation qualified as an agency “rule,” which is necessarily “agency action” under the APA’s definition, see 5 U.S.C. § 551(13), and it was the final version of that rule. See Abbott Labs., 387 U.S. at 149-50. Here, by contrast, the only agency action that has occurred thus far is the Secretary’s denial of the State’s waiver requests – an action that simply leaves in place the statutory requirements that existed before, and does not itself create or alter any rights or obligations. The Court of Appeals for the Second Circuit has held that the issuance of a “compliance order” that does not alter the recipient’s duties or obligations and that simply requires “compl[iance] with the law” lacks the requisite character for a “final agency action.” Asbestec Construction Servs., Inc. v. United States Environmental Protection Agency, 849 F.2d 765, 768-69 (2^d Cir. 1988).¹⁰

Finally, this case does not present the same threat of immediate harm that was presented in Abbott Laboratories. In that case, drug manufacturers were forced to choose between costly compliance with the challenged regulation, or the immediate imposition of civil or criminal sanctions. The drug companies thus faced serious and potentially irreparable harm that would occur *before* they could obtain judicial review of any actual enforcement action. Here, under the GEPA’s review provisions, any withholding of program funds (or any other enforcement action available to the Secretary under 20 U.S.C. § 1234c¹¹) would be stayed pending judicial review.

¹⁰ Moreover, as discussed in detail below, the agency’s decision to grant or deny a waiver request – unlike the agency’s decision to take enforcement action under 20 U.S.C. § 1234c – is committed to agency discretion by law and therefore is not subject to judicial review. See Part IV, infra.

¹¹ For example, the Secretary could issue a “cease and desist” order, which would trigger an administrative and judicial review process similar to the review process for withholding. See

See 20 U.S.C. § 1234g(a) (“The Secretary may not take any action on the basis of a final agency action until judicial review is completed.”). Accordingly, there is no possibility that postponing consideration until such time as the agency decides to pursue enforcement could result in the State’s being harmed by the withholding of program funds during the interim period. Under these circumstances, the State’s claim is not ripe for review.

II. Plaintiffs Lack Standing and Have Failed to State a Claim Because the State’s Alleged Expenses Are Not Attributable to the NCLB’s Conditions of Assistance

The State’s suit suffers from a second threshold flaw that must be addressed before addressing the individual claims set forth in the Complaint. The underlying premise of all of the State’s claims is that compliance with certain NCLB conditions of assistance would require the State to expend its own funds. The State argues that both the NCLB and the Constitution release the State from compliance under such conditions; as shown in Part III, infra, this argument is without merit. The Court need not reach that issue, however, as the State’s own Complaint demonstrates that the expenses in question do *not* stem from any of the NCLB’s conditions of assistance. Rather, as discussed below, these expenses derive from the State’s decision to take certain steps – i.e., “written response” testing, modified-standard assessments for disabled students, and assessments in foreign languages for LEP students – that are entirely optional

20 U.S.C. §§ 1234c, 1234e.

As noted in footnote 5, supra, the Secretary also could withhold funds for state administration under 20 U.S.C. § 6311(g). While no statutory provision requires the Secretary to stay the implementation of this sanction pending judicial review, the statute contemplates that funds will be withheld only pending resolution of the noncompliance issue. See 20 U.S.C. § 6311(g)(2) (“[T]he Secretary may withhold funds for State administration . . . until the Secretary determines that the State has fulfilled [the] requirements . . .”).

under the Act. This fact undermines the entire premise of the State's claim of an unfunded "mandate," and also defeats the State's claim to standing.

The first condition of assistance that the State seeks to avoid is the requirement of testing all students in grades 3 through 8. Connecticut already administers tests that meet the NCLB's standards to students in grades 4, 6, and 8; the State alleges that federal funds are insufficient to extend "Connecticut tests" to grades 3, 5, and 7. Complaint ¶ 61. However, as the State's Complaint acknowledges, the tests that Connecticut currently administers (the "Connecticut tests") are "among the most rigorous in the nation," lasting seven hours and encompassing "short essays and explanations as well as multiple choice questions." Complaint ¶¶ 47, 49. The Department of Education suggested that Connecticut could address its concerns about costs by eliminating written-response testing from the assessments administered to grades 3, 5, and 7. See Complaint ¶ 73.¹² The Complaint cryptically states that Connecticut deemed this proposed solution "unworkable"; it notably fails to allege that Connecticut was somehow *unable* to implement this solution, or that doing so would still require Connecticut to expend its own funds.¹³ See Complaint ¶ 74. However compelling Connecticut's reasons may be for preferring written-response testing, the State's claim can survive only if this option is compelled *by the Secretary*. It is apparent from the State's own Complaint, see id. at ¶ 73, as well as from the

¹² The Secretary had previously informed Connecticut that its tests "go[] beyond what is required by NCLB." Letter from Spellings to Sternberg of 5/3/05, at 1 (available at www.state.ct.us/sde/nclb/Correspondence/index.html).

¹³ In fact, according to correspondence posted on the website for the State of Connecticut Department of Education, Connecticut's reason for not implementing the Secretary's proposed solution was that, "[f]or us, assessments limited to multiple-choice questions would amount to a 'dumbing down' of the tests – and this is something we will not do." Letter from Sternberg to Spellings of 4/22/05, at 1 (available at www.state.ct.us/sde/nclb/Correspondence/index.html).

NCLB's provisions setting forth the minimum standards that states' assessments must meet (see 20 U.S.C. § 6311(b)(3)(C)), that this is not the case.

The second requirement that the State seeks to avoid is the requirement of testing disabled students at grade level. The State presents out-of-level testing as a necessary alternative to developing a regime of modified-standard assessments for certain disabled students, for which federal funding would be "woefully insufficient." Complaint ¶ 80. Developing modified-standard assessments for disabled students, however, is not a requirement of the NCLB. To the contrary, as the State's Complaint makes clear, both the policy of assessments based on modified standards (to be established in forthcoming regulations) and the interim flexibility for assessing certain disabled students are newly announced *options*. See Complaint ¶ 70 ("Secretary Spellings stated that . . . only states that 'follow the principles' of NCLB 'will be eligible'"); id. at ¶ 71 (the new policy "contemplates *permitting* up to 2% of students to be tested using 'modified' or alternate assessments") (emphasis added); id. at ¶ 80 ("*[I]n order to take advantage of the [new policy]*, Connecticut would be required to develop an entirely new testing regime for special education students for each grade to be tested.") (emphasis added). Indeed, the State was required to obtain permission to implement the interim flexibility measures. See Complaint ¶ 79 ("On June 28, 2005, Commissioner Sternberg formally requested the 'interim flexibility' for testing special education students . . . [and was] granted oral permission . . ."). To the extent that seeking and obtaining this permission allegedly will result in "millions of

dollars of additional expenses,” Complaint ¶ 72,¹⁴ it is quite clear that this expense was voluntarily assumed by Connecticut, not imposed by the NCLB or the Secretary.

Third, the State seeks to be released from the requirement of testing LEP students during their second and third years in the U.S. school system (LEP students already are excused from testing in reading/language arts during their first year). The State presents this as a necessary alternative to developing assessments in foreign languages, which allegedly would require the expenditure of the State’s own funds. See Complaint ¶ 62. Again, however, neither the NCLB nor the Secretary has required the State to develop foreign language assessments. The NCLB provides that states, in administering assessments to LEP students, should provide “reasonable accommodations . . . including, *to the extent practicable*, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas.” 20 U.S.C. § 6311(b)(3)(C)(ix)(III) (emphasis added). As the italicized language indicates, states are not required to translate assessments into foreign languages if doing so would be impracticable, and the Complaint does not allege that the Secretary has deemed Connecticut to be in noncompliance with the Act due to Connecticut’s failure to implement foreign language assessments. Again, therefore, any expenses incurred by Connecticut to develop foreign language assessments will be the result of a voluntary choice by the State, not a requirement of the Act or the Secretary.

¹⁴ Given the Secretary’s announcement in May 2005 that the new policy will be set forth in regulations, see <http://www.ed.gov/news/pressreleases/2005/05/05102005.html>, and given that these regulations have not yet been issued, it is not clear how the State has determined that it will be “required to develop an entirely new testing regime” under the new policy. The Secretary’s official guidance regarding the interim policy does not require or contemplate the development of new assessments. See <http://www.ed.gov/policy/elsec/guid/raising/disab-options.html>.

The significance of the fact that the State's anticipated expenses derive from voluntary undertakings, rather than NCLB requirements or requirements imposed by the Secretary, is twofold. First, it defeats the State's claim to standing. In order to establish the "irreducible constitutional minimum of standing," which is a jurisdictional prerequisite, the State must show (1) that it has "suffered an injury in fact" that is "concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical"; (2) that there exists "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because the State may still satisfy the NCLB's requirements (and thus avoid any penalty) by implementing multiple-choice testing in grades 3, 5, and 7, declining the option to implement a regime of modified-standard assessments for certain disabled students, and continuing to test LEP students in English after their first year of U.S. schooling, the State has not established that it will incur any injury at all.¹⁵ Moreover, to

¹⁵ The Complaint suggests that the State of Connecticut would suffer an alternative harm if it did not develop foreign language assessments for LEP students, inasmuch as the State would "suffer the series of escalating consequences when its school districts and schools fail to make AYP [adequate yearly progress] because their [LEP] students cannot understand the tests." Complaint ¶ 86. Similarly, the Complaint alleges that "[t]he State of Connecticut and the General Assembly will be harmed by having Connecticut's schools and school districts unfairly labeled as failing" if the waivers are not granted – implying that, if disabled and LEP students were required to take tests at grade level and in English, and if the federal government provided insufficient funding to finance the more expensive alternative of modified-standard assessments/foreign language assessments, these students would do poorly enough on the tests to damage Connecticut's reputation. See Complaint ¶ 91. These are clear examples of injuries that are "speculative" and "conjectural," rather than "actual or imminent." Lujan, 504 U.S. at 560. As discussed above, the Secretary already permits states to exempt LEP students from reading/language arts testing requirements during their first year of schooling in the U.S., and has implemented various measures (other than creating new modified-standard assessments) to provide flexibility in assessing disabled students. Plaintiffs' Complaint sets forth no facts which would establish that a requisite percentage of LEP and disabled students will be unable to meet

the extent the State *chooses* to implement written-response testing, modified-standard testing for disabled students, and foreign language testing for LEP students, any additional costs incurred will be a result of that choice, not of the NCLB's requirements. A plaintiff lacks standing when the injury upon which it premises its assertion of jurisdiction is "self-inflicted." See, e.g., Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (plaintiff states lacked standing to challenge income taxes imposed on their residents by other states, where the proximate cause of the harm to the plaintiff states was their legislatures' decision to grant tax credits to residents for income taxes paid to other states).¹⁶

Second, even if the Court finds that the State has standing, the fact that the State's expenses would be attributable to actions that are not required by the federal government plainly defeats its substantive claims. The State alleges that the Secretary has violated 20 U.S.C. § 7907(a), exceeded the federal government's powers under the Spending Clause, and violated the Tenth Amendment by "mandating" the expenditure of state funds in order to meet NCLB requirements. See Complaint ¶¶ 93-102. In fact, the State's own Complaint establishes that the identified expenditures stem from activities that are wholly voluntary: the development and

the goals that the State sets for such students under the current policies. Furthermore, the claim that the State's schools will fail if waivers are not granted raises the threshold question of whether this injury is caused by the Secretary or by the State's own educational performance. See Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (plaintiff lacks standing where injury is "self-inflicted").

¹⁶ The General Assembly of Connecticut lacks standing for an additional reason. Only in extremely rare circumstances have the courts recognized "legislative standing" that stems from an institutional injury, rather than an injury that affects a legislator or legislators personally. The General Assembly has not alleged any injury that would befall its individual members, nor has it alleged the type of institutional injury that has heretofore been recognized by the courts. See Raines v. Byrd, 521 U.S. 811, 821-23 (1997).

implementation of written-response testing (the so-called “Connecticut tests”) in grades 3, 5, and 7, the development and implementation of modified-standard assessments for certain disabled students, and the development and implementation of foreign language assessments for LEP students. See Complaint ¶ 61. Inasmuch as the Complaint does not (and could not) allege that these undertakings are required by the NCLB or by the Secretary, any allegation that the federal government has “mandate[d]” the expenditure of state funds must fail.

III. Even if the State’s Alleged Expenses Were Attributable to the NCLB’s Conditions of Assistance, Plaintiffs Have Failed to State a Claim

A. Section 7907(a) Would Not Excuse the State of Connecticut from Compliance with the NCLB’s Conditions of Assistance

Even if the State’s expenses did result from the NCLB obligations it seeks to avoid, requiring compliance with these obligations would not violate § 7907(a), as alleged in the State’s first claim. See Complaint ¶¶ 93-97. As demonstrated below, it is evident from the text of § 7907(a), the existence of other provisions in the NCLB, and the underlying purpose of the Act, that the provision does not excuse states from compliance with the NCLB’s conditions of assistance based on a claim of inadequate federal funding.

1. The State’s Interpretation of § 7907(a) Conflicts With the Plain Language of § 7907(a)

The full text of 20 U.S.C. § 7907(a), which the State calls the “Unfunded Mandates Provision,” is as follows:

(a) GENERAL PROHIBITION. Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction or allocation of State or local resources or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

NCLB § 9527(a), codified at 20 U.S.C. § 7907(a).

The State erroneously interprets this provision to prohibit the federal government from requiring a state to comply with the conditions of assistance established by Congress, if doing so would involve any expenditure of state funds. See, e.g., Complaint ¶ 11 (“The Secretary is violating the Unfunded Mandates Provision of the NCLB Act by requiring the State of Connecticut and its school districts to comply with . . . the NCLB mandates even though . . . the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance.”); id. at ¶ 39 (“By its terms, the Unfunded Mandates Provision prohibits the federal government from requiring States or school districts to spend their own funds in order to comply with the requirements of the NCLB Act.”). In fact, § 7907(a) makes no reference to *conditions of assistance* imposed by *Congress*. Instead, the provision refers to “mandate[s]” imposed by “an officer or employee of the Federal Government.”

These distinctions are not merely semantic. A “mandate,” by definition, is an authoritative command that leaves the subject with no choice. By contrast, a condition of assistance allows states the option of accepting federal funds subject to compliance with that condition, or deciding to forego federal funds if the state determines that compliance with the condition would be unfeasible or undesirable (e.g., if the state believes that the federal funds provided are insufficient). See Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 11 (1981) (noting that many “federal-state cooperative programs” are “voluntary,” in that “the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding”). This distinction between a “mandate” and a “condition of assistance” is well-recognized in the law. See, e.g., Printz v. United States, 521 U.S. 898, 917-

18 (1997) (statutory requirements connected to receipt of federal funding are “more accurately described as conditions upon the grant of federal funding than as mandates to the States”); Padavan v. United States, 82 F.3d 23, 29 (2^d Cir. 1996) (imposing conditions of assistance on receipt of federal Medicaid funds is not “commandeering” state action, since “Medicaid is a voluntary program in which states are free to choose whether to participate”); Kansas v. United States, 214 F.3d 1196, 1203 (10th Cir. 2000) (“While the amount of money that would be lost through non-compliance is substantial, the [statute] does not directly compel or command state employees to take any action whatsoever. States are free to refuse to implement the conditions and to decline the grant money.”). Accordingly, federal officials have not “mandated” that states comply with a given requirement – and they certainly have not “mandated” that the states spend their own funds in doing so – when states voluntarily accept that requirement in exchange for federal assistance.

There is no question that Congress shared this common understanding of the term “mandate.” In the Committee Reports for the NCLB, both the Senate and the House of Representatives reported the conclusion of the Congressional Budget Office (“CBO”) that the NCLB contains no “mandates” to state or local governments, because “[a]ny costs incurred by state, local, or tribal governments would result from complying with conditions of aid.” See S. Rep. No. 107-7, at 57; H.R. Rep. No. 107-63(I), at 406. The CBO relied on Congress’s own definition of “federal intergovernmental mandate” as set forth in the Unfunded Mandates Reform Act of 1995 (“UMRA”), which expressly exempts “a condition of federal assistance.” 2 U.S.C. § 658(5)(A)(i)(I).

In addition to misreading the word “mandate,” the State ignores the words “an officer or employee of the federal government” in the introductory clause of the provision. See 20 U.S.C. § 7907(a) (“Nothing in this chapter shall be construed *to authorize an officer or employee of the federal government* to mandate”) (emphasis added). The conditions of assistance that the State seeks to avoid were not imposed by “an officer or employee of the federal government”; they were imposed by Congress. The purpose of § 7907(a) – as its plain language makes clear – is not to place limits on the conditions of assistance that *Congress* developed and that states agreed to accept; rather, it is to limit the ability of *federal officials* to layer expensive and burdensome requirements at the agency level (e.g., the purchase of particular educational materials) on top of the broad conditions established by Congress. The State’s interpretation of § 7907(a) simply reads the words “an officer or employee of the federal government” out of the statute. It is a “cardinal principle of statutory construction,” however, that a statute should not be construed in a manner that would render certain terms “superfluous, void, or insignificant.” TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001). It is particularly inappropriate to view the inclusion of the words “an officer or employee of the federal government” as merely *pro forma* when Congress omitted these words from the same introductory clause just three subsections later. See 20 U.S.C. § 7907(d) (“Nothing in this chapter shall be construed to mandate”); see also Beach v. Ocwen Federal Bank, 523 U.S. 410, 418 (1998) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks and citations omitted).

Based on the plain language of § 7907(a), the only federal court to issue an opinion interpreting that provision – the United States District Court for the Eastern District of Michigan – rejected a claim identical to the State’s claim here. The plaintiffs in that case, like the State of Connecticut here, argued that § 7907(a) should be interpreted to release states and local school districts from Congressionally-imposed conditions of assistance if meeting these conditions would require the expenditure of state or local funds. The court held that this interpretation of § 7907(a) “is defeated by inclusion of the words ‘an officer or employee of.’ If Congress had meant that federal funding would pay for 100% of all NCLB requirements, then the inclusion of these words would have been unnecessary.” School Dist. of the City of Pontiac v. Spellings, Civil Action No. 05-CV-71535-DT, Opinion and Order at 7 (D. Mich. Nov. 23, 2005) (attached).

The court went on to observe:

By including the words “officer or employee of,” Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute. If, as plaintiffs contend, Congress intended to prohibit unfunded mandates, it would have omitted the words “an officer or employee of” or simply stated that the Federal Government will reimburse the States for all costs they incur in complying with the requirements of the statute.

Id. The court concluded that § 7907(a) “cannot reasonably be interpreted” in the manner that the plaintiff in that case (and the State in this case) would suggest. See id.

In short, as the district court in Michigan concluded, there is no plausible manner in which a provision limiting federal officials’ authority to compel state action could be construed to limit Congress’s authority to establish conditions that states may choose whether to fulfill. When the words of the provision are given their plain and ordinary meaning, and when each

word is given effect, § 7907(a) does not support the State's attempt to evade the conditions it previously chose to accept.

2. The State's Interpretation of § 7907(a) Conflicts With Other Provisions of the NCLB

In construing language within a statute, courts must “look to the provisions of the whole law.” Regions Hospital v. Shalala, 522 U.S. 448, 460 n.5 (1998). In particular, courts should avoid any interpretation that would create a conflict with another provision of the statute or render another provision inoperative. See, e.g., Mountain States Telephone and Telegraph Co., 472 U.S. 237, 249 (1985) (citing “the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative”) (internal quotation marks and citation omitted); State of New Jersey v. State of New York, 1997 WL 291594, at *28 (U.S.) (“[I]f the literal language of the controlling section of the statute contradicts another section, the controlling section should be harmonized so as not to render the other section inoperative . . .”). Here, the State's interpretation of § 7907(a) – namely, that states may be excused from conditions of assistance if they would be required to spend their own funds to comply – directly conflicts with numerous other provisions of the Act.

Most relevant to this case, and dispositive of the State's claim, is the provision of the Act dealing with federal funding for the development and implementation of yearly assessments. That provision states:

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of [the NCLB] is less than:

(i) \$370,000,000 for fiscal year 2002;

- (ii) \$380,000,000 for fiscal year 2003;
- (iii) \$390,000,000 for fiscal year 2004; and
- (iv) \$400,000,000 for fiscal years 2005 through 2007.

20 U.S.C. § 6311(b)(3)(D). This provision makes quite clear that, even though a state may be excused (for a limited period of time) from the requirement of implementing yearly assessments if federal funding falls below certain levels, a state may not cease the development of yearly assessments *regardless of the level of federal funding*. It also makes clear that states are *not* excused from the requirement of implementing the tests so long as the amount of federal funding remains at specified levels. It is undisputed that Congressional appropriations have met or exceeded these levels every year since the enactment of the NCLB. See 115 Stat. 2202-03 (\$387 million appropriated in 2002), 117 Stat. 328 (\$387 million appropriated in 2003); 118 Stat. 257 (\$391.6 million appropriated in 2004); 118 Stat. 3144 (\$400 million appropriated in 2005). Accordingly, by the plain terms of the statute, *the State may not be excused from implementing the NCLB's testing requirements based on a claim of inadequate federal funding*.

Section 6311(b)(3)(D) is significant for an additional reason: it demonstrates that, where Congress intended to predicate a state's obligation to fulfill a condition of assistance on the availability of federal funding, it did so explicitly. Congress included a similar qualifier in the provision regarding state participation in biennial testing of 4th and 8th graders under the National Assessment of Educational Progress; the NCLB requires such participation "*if* the Secretary pays the costs of such assessments." 20 U.S.C. § 6311(c)(2) (emphasis added). Were the State's interpretation of § 7907(a) correct, this proviso would be wholly superfluous, in derogation of the principle that statutory language should be construed to give meaning to all terms. See, e.g., TRW, 534 U.S. at 31. Moreover, the omission of this same qualifier ("if the Secretary pays the

costs”) from other requirements of the Act must be presumed both intentional and significant. See Ocwen Federal Bank, 523 U.S. at 418 (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks and citations omitted).

In addition to § 6311(b)(3)(D), the State’s interpretation of § 7907(a) cannot be reconciled with the many provisions of the NCLB that require states to match the federal grant amount with state funds as a condition of receiving federal funds for a particular program. For example, the subsection of the NCLB dealing with federal grants for Even Start family literacy programs states:

MATCHING REQUIREMENT. – The Secretary *shall not make a grant to a State educational agency under this subsection unless* the State educational agency agrees that, with respect to the costs to be incurred by the eligible consortium in carrying out the activities for which the grant was awarded, *the State educational agency will make available non-Federal contributions* in an amount equal to not less than the Federal funds provided under the grant.

20 U.S.C. § 6381a(c)(5) (emphasis added). Similarly, a local educational agency that applies for a federal grant to fund a high-technology demonstration program “shall provide, either directly or through private contributions, non-Federal matching funds equal to not less than 50 percent of the amount of the grant.” 20 U.S.C. § 7255d(b)(3). Priority for receiving grants under the Advanced Placement Incentive Program is reserved to states that “assure[] the availability of matching funds from State, local, or other sources to pay for the cost of activities to be assisted.” 20 U.S.C. § 6535(c)(3). These provisions are facially inconsistent with – and would be rendered “inoperative” by – the State’s interpretation of § 7907(a), under which Congress intended the federal government to pay all costs, and states and local governments cannot be required to

contribute any non-federal funds to any project. Moreover, these provisions illustrate that § 7907(a) is intended to limit the requirements imposed by federal officials and employees, rather than the requirements imposed by Congress. Clearly, Congress may require – as a condition of federal assistance – a particular allocation of State funds, e.g., that state educational agencies provide at least 50% of the funding for Community Technology Center programs. See 20 U.S.C. § 7263a(c). The purpose of § 7907(a) is to prevent federal officials from grafting similar spending requirements on top of other provisions of the Act.

Finally, it must be remembered that the central goal of the NCLB is to assist the states in discharging what is primarily a state and local responsibility: helping students to become proficient in reading/language arts and mathematics. See 20 U.S.C. § 6311(b)(2)(F); S. Rep. No. 107-7, at 3 (even under the NCLB, “the Federal Government provides only a fraction of overall funding for elementary and secondary education in the United States”). Various provisions of the statute reaffirm that the NCLB is designed to supplement state efforts, not substitute for them. In particular, the NCLB expressly prohibits states from using federal funding to supplant funding that would otherwise come from the state:

A State educational agency or local educational agency shall use Federal funds received under [Title I, Part A] only to supplement funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

20 U.S.C. § 6321(b)(1); see also 20 U.S.C. §§ 6321(a), 6336(e), 7217(a), 7901(a) (“maintenance of effort” provisions conditioning federal funding on state or local governments’ continuation of previous levels of state or local funding). This provision makes clear that states *must* spend their own funds to meet the requirements of the NCLB, if these requirements overlap with

undertakings that the states would otherwise pursue on their own. The State's interpretation of § 7907(a) accordingly could be correct only if the states ordinarily would not spend *any* of their own funds on *any* of the activities required under the Act. Given the fundamental nature of the Act's educational purpose, such a claim would be facially untenable; while the State may quibble over whether particular individual requirements are necessary, the State could not plausibly assert that states ordinarily would spend none of their own funds on, for example, assisting students to make adequate yearly progress in reading/language arts and mathematics. See 20 U.S.C. § 6311(b)(2)(A). Inasmuch as the NCLB's requirements are designed to further an educational mission that is shared by – and remains the primary responsibility of – state and local governments, it follows that the Act contemplates the expenditure of state and local funds.

3. The State's Interpretation of § 7907(a) Would Undermine Congressional Intent

When interpreting a particular statutory provision, courts should look to “the provisions of the whole law, and its object and policy.” Regions Hosp., 522 U.S. at 460 n.5. Statutes must be interpreted “in light of the purposes Congress sought to serve,” see Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 36 (1983); conversely, courts should avoid any interpretation that would “conflict with the intent embodied in the statute Congress wrote.” Chickasaw Nation v. United States, 534 U.S. 84, 85 (2001). As shown below, the interpretation of § 7907(a) urged by the State would violate this cardinal principle of statutory construction by pitting two of the NCLB's operating principles against one another and wholly subverting one of them.

Accountability is the foremost principle of the NCLB. According to the NCLB “Statement of Purpose,” Congress's central strategy for ensuring that all students have the

opportunity to obtain a high-quality education is to “measure[] progress against common expectations for student academic achievement” and to “hold[] schools, local educational agencies [LEAs], and States accountable for improving the academic achievement of all students.” 20 U.S.C. § 6301(1), (4). The legislative history repeatedly underscores the importance of accountability under the Act; indeed, the House Committee Report identifies “academic accountability” as the “centerpiece” of the NCLB. H.R. Rep. No. 107-63(I) at 281; see also id. (observing that the NCLB is designed to “hold[] States, [LEAs], and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards”); S. Rep. 107-7 at 2 (noting that the statute “will demand greater accountability for student performance . . . and require real consequences and wider choices when schools fail our children”); Statement by Pres. George W. Bush Upon Signing H.R. 1, 2002 U.S.C.C.A.N. 1614, 1616 (2002) (President’s statement that the NCLB’s “first principle is accountability”).

A second important principle of the statute is that state and local governments and schools should be given the maximum possible flexibility and autonomy in determining how best to meet the conditions established in the Act. This principle, like the principle of accountability, is reflected in both the text and the legislative history of the NCLB. The Act’s “Statement of Purpose” sets forth the statute’s intent to “provid[e] greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance.” 20 U.S.C. § 6301(7). The Senate Committee Report similarly notes that a primary purpose of the Act is to “provide more flexibility,” S. Rep. 107-7 at 2, while the House Committee Report describes the Act as “a bill to close the achievement gap with accountability, flexibility, and choice.” H.R. Rep. No. 107-63(I), at 1; see also 147 Cong. Rec. H2396-02,

H2396 (statement of Rep. Isakson) (NCLB “ensures more flexibility than has ever been allowed with Federal funds”); id. at H2399 (statement of Rep. Roukema) (“It is important to emphasize that the States will develop their own standards and assessment[s]. This bill does not dictate a national test.”).

Under the State’s interpretation of § 7907(a), the second principle (local autonomy in determining how to fulfill the Act’s requirements) would effectively cancel out the first principle (accountability). To maximize flexibility and autonomy, the NCLB does not dictate the precise contents of the yearly assessments that states must administer; instead, states are granted wide latitude to develop their own assessments and method of administration. See 20 U.S.C. §§ 6311(b)(3)(C), 6311(e)(1)(F). As a result, there is no fixed “cost of compliance” with the yearly assessment requirement; rather, that cost is largely dependent on individual choices made by the states. If designing an assessment system that would be more costly than the federal funding allotted for that purpose were sufficient to excuse a state from implementing that system, few states could be held to the testing requirement, even though it is one of the Act’s most important tools for holding schools accountable for students’ performance. See 147 Cong. Rec. H2396-02, at H2400 (testing provisions are “the centerpiece of the President’s plan for accountability”). Moreover, judicial review to ensure that states’ expenses were indeed “necessary” for compliance would be a poor solution. Every annual appropriation would spawn fifty-two lawsuits in which the courts would be invited (as this Court is being invited here) to serve as the arbiters of good educational policy, deciding which educational decisions were worth the money spent and whether less expensive alternatives would have been equally sound from an education policy perspective. As discussed in Part IV, infra, courts are simply not the appropriate

institutions to make such decisions, and the result would inevitably be a dramatic erosion of the principle of accountability enshrined in the Act.

The fallacy of allowing an “insufficient funding” loophole to the NCLB’s principle of accountability is particularly apparent when one considers another core requirement of the NCLB, i.e., that schools demonstrate “adequate yearly progress.” 20 U.S.C. § 6311(b)(2)(A). The definition of the term “adequate yearly progress” is largely subject to state discretion, but must encompass a statistically reliable way of measuring student progress based on academic assessments. See 20 U.S.C. § 6311(b)(2)(C)(ii), (iv). It would be nearly impossible to assess a claim that a particular amount of money is or is not sufficient to produce statistically measurable academic progress among students. More fundamentally, it is self-evident that Congress did not intend the federal government to bear the entire cost of helping students to make academic progress. Education remains a primarily state and local responsibility, and in passing the NCLB, the Senate recognized that “the Federal Government provides only a fraction of overall funding for elementary and secondary education in the United States.” S. Rep. 107-7, at 7. Interpreting § 7907(a) to create an excuse from compliance with the condition of demonstrating academic progress based on the fact that the federal government has not taken sole fiscal responsibility for that effort would eviscerate this critical aspect of the legislation. Such a result would subvert, not serve, Congress’s purpose.

B. The Secretary May Constitutionally Enforce the NCLB’s Conditions of Assistance

The State’s second claim is that requiring the State to comply with the NCLB’s conditions of assistance in order to receive federal funds would violate the Spending Clause and the Tenth Amendment if compliance would involve the expenditure of State funds. See

Complaint ¶¶ 98-102. As discussed in detail in Part II, supra, the State's allegations do not establish that compliance with the NCLB's conditions would result in any expense to the State, inasmuch as the expenses that the State identifies would be attributable to undertakings that the NCLB does not require. But even if the State's expenses *were* a result of compliance with the NCLB's conditions of assistance, enforcing those conditions would not exceed the federal government's authority under the Spending Clause or violate the Tenth Amendment. As discussed herein, the Spending Clause allows the federal government to require compliance with unambiguous conditions of federal assistance. Moreover, the federal government may impose obligations that might otherwise intrude upon state sovereignty when those obligations are voluntarily assumed by states in return for federal funding.

1. The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Spending Clause

The Spending Clause of the Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1. “Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” South Dakota v. Dole, 483 U.S. 203, 206 (1987) (internal quotation marks and citation omitted); see also Suter v. Artist M, 503 U.S. 347, 356 (1992) (“[I]t [is] well-established that Congress has the power to fix the terms under which it disburses federal money to the States.”); Pennhurst, 451 U.S. at 17 (“Turning to Congress’ power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.”).

Courts have recognized four limitations on Congress's authority under the Spending Clause. First, the exercise of the spending power must be in pursuit of "the general welfare," with substantial deference paid to Congress's judgment as to whether a particular expenditure is intended to serve public purposes. See South Dakota, 483 U.S. at 207. Second, when attaching conditions to the receipt of federal funds, Congress "must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" Id. (quoting Pennhurst, 451 U.S. at 17). Third, conditions of assistance could be deemed illegitimate if "they are unrelated to the federal interest in particular national projects or programs." Id. (internal quotation marks and citation omitted). Fourth, the Spending Clause power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." Id. at 210.

The State does not allege that the NCLB is not intended to serve "the general welfare," that the conditions of assistance under the NCLB are "unrelated to the federal interest" in a national program, or that enforcing the NCLB's conditions of assistance would induce the State to engage in unconstitutional activities. The State relies instead on the second limitation on Congress's spending power, claiming that the Secretary, by enforcing the NCLB's conditions of assistance, is "changing one of the conditions pursuant to which States accepted funds under the NCLB – namely, that the State and its school districts would not be required to 'spend any funds or incur any costs not paid for' under this Act – thereby precluding the State from exercising its choice to participate in the NCLB Act knowingly, cognizant of the consequences of its participation." Complaint ¶ 101.

The leading Supreme Court case regarding this second limitation on the federal government's Spending Clause power is Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). In that case, the Commonwealth of Pennsylvania had accepted federal funds under the Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DDABRA"). The DDABRA contained several specific conditions of assistance, and required states to submit plans explaining how they would comply with these. The statute also contained a "bill of rights" which stated, inter alia, that persons with developmental disabilities "have a right to appropriate treatment . . . in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010. The question before the Court was whether the "bill of rights" created any enforceable obligations on the part of the states. The Court began by noting:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Id. at 17. Examining the text and history of the "bill of rights," the Court concluded, "We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment." Id. at 19. Contrasting the "bill of rights" with the statute's express conditions of assistance, the Court noted that "[s]ection 6010 . . . in no way suggests that the grant of federal funds is 'conditioned' on a State's funding the rights described therein. The existence of explicit conditions throughout the Act, and the absence of conditional language in § 6010, manifest the limiting meaning of § 6010." Id. at 23. Because the Court found that bill of rights represented "general statements of

federal policy, not newly created legal duties,” it held that the plaintiffs below could not bring suit to enforce its provisions. Id. at 23.

Pennhurst provides no assistance to the State of Connecticut. The Supreme Court has expressly distinguished the requirements contained in Title I of the ESEA (the statute at issue here, as amended by the NCLB) from the “bill of rights” at issue in Pennhurst, finding that the former are unquestionably “conditions of assistance”:

In Pennhurst, . . . [w]e observed: “Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.” The requisite clarity in this case is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I *as a condition for receiving funds*.

Bennett v. Kentucky Department of Educ., 470 U.S. 656, 666 (1985) (internal citation omitted) (emphasis added); see also Bell, 461 U.S. at 790 (“The State chose to participate in the Title I program and, *as a condition of receiving the grant*, freely gave its assurances that it would abide by the conditions of Title I.”). As the Court recognized, the requirements of Title I could not possibly be construed as mere “declarations of policy” or expressions of “congressional preference.” For example, the requirement that Connecticut now seeks to avoid – annual testing of all students at grade level – is set forth in the following unambiguous language:

(a) PLANS *REQUIRED*. –

(1) IN GENERAL.– For any State desiring *to receive a grant* under this part, the State educational agency *shall* submit to the Secretary a plan . . . that satisfies the requirements of this section

(A) IN GENERAL.– Each State plan *shall demonstrate* that the State educational agency, in consultation with local educational agencies, *has implemented* a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science

(C) *REQUIREMENTS.* – Such assessments *shall* –

(i) be the same academic assessments used to measure the achievement of *all children*;

...

(vii) beginning *not later than* school year 2005-2006, measure the achievement of students . . . *in each of grades 3 through 8*

(ix) provide for--

(I) the participation in such assessments of *all students*;

...

(f) *DURATION OF THE PLAN.*–

(1) *IN GENERAL.*– Each State plan *shall* –

(A) remain in effect for the duration of the State’s participation under this part

20 U.S.C. § 6311 (emphasis added). The statute also requires states to provide “a single set of assurances” to be kept on file with the Secretary, including an assurance that “each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications.” 20 U.S.C. § 7844(a)(1). This language is almost identical to those provisions of the DDABRA that the Pennhurst Court found *were* conditions of assistance. See Pennhurst, 451 U.S. at 13-14, 23 (Section 6063 of DDABRA, which imposes conditions “in clear terms,” requires “that any State desiring financial assistance submit an overall plan satisfactory to the Secretary of HHS”; the plan “must comply with several specific conditions” and must “be supported by assurances” that the states will take certain steps); cf. Suter, 503 U.S. at 358 (finding that “the terms of [the statute] are clear” for purposes of applying Pennhurst where the

statute states that, “[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary”).

It also is notable that, unlike the plaintiffs in Pennhurst, the State *expressly pledged* to fulfill the conditions of which it now claims to have had insufficient notice. The State’s “Accountability Workbook” (part of the State’s application for federal funds), submitted in January of 2003, contained the following assurances:

Section 10-14n of the Connecticut General Statutes requires all students in the public schools in Grades 4, 6, 8 and 10 to participate in the state assessments. Students in Grades 3, 5 and 7 will also be included in the state assessments starting with the 2005-06 school year.

Effective September 2003, all LEP [“limited English proficiency”] students except for those students in their first academic year of enrollment in a U.S. school, will participate in the state assessments, with or without accommodations, and their results will be included in the State Accountability System.

See Connecticut’s June 9, 2003 Consolidated State Application Accountability Workbook, at 28, 44 (available at www.ed.gov/admins/lead/account/stateplans03/ctcsa.pdf). These assurances were an express, unqualified commitment by the State to perform the conditions established by the Act in order to obtain federal funding. Notably absent from these assurances is *any* statement that the State’s promises were conditional on receiving a certain amount of funding from the federal government.

The State cannot rely on § 7907(a) to insert ambiguity into the NCLB’s facially unambiguous conditions of assistance. As noted above, the plain language of § 7907(a), in addition to the many other provisions of the Act that expressly contemplate the expenditure of state and local funds, foreclose the State’s interpretation. See Pontiac Opinion and Order at 3, 7 (dismissing identical Spending Clause challenge based on plain language of § 7907(a)). With

respect to the annual testing requirement in particular, any alleged ambiguity as to whether inadequate federal funding would excuse compliance is removed by 20 U.S.C. § 6311(b)(3)(D), which specifies the precise level of federal funding below which certain elements of the testing requirement (but not others) may be excused. See Part III.A.2, supra. Moreover, Connecticut's own application for funding, in which the State gave its unqualified assurance that it would implement the testing requirement, precludes any claim that the State was uncertain about what its obligations were.

Finally, even if § 7907(a) could be read to prohibit Congress from requiring states to expend any funds under the Act, it does not follow – and the provision certainly does not state – that the remedy is to excuse states unilaterally from compliance with the conditions of assistance, and to require the federal government to provide full funding on the states' self-dictated terms. Rather, if the federal-state partnership envisioned by the NCLB would violate § 7907(a) in a particular case, then that partnership should be dissolved, with the State absolved from any further accountability to the federal government and the federal government relieved of any duty to provide the State with grants.

2. The Federal Government May Enforce Unambiguous Conditions of Assistance Under the Tenth Amendment

The State's Tenth Amendment claim – that “Defendant Spellings is . . . coercing the State of Connecticut to take actions that Congress could not otherwise compel it to take” (Complaint ¶ 100) – adds nothing to its Spending Clause argument. It is well-established that Congress's authority under the Spending Clause “‘is not limited by the direct grants of legislative power found in the Constitution,’” and that “objectives not thought to be within Article I's ‘enumerated legislative fields’ . . . may nevertheless be attained through the use of the spending power and the

conditional grant of federal funds.” South Dakota, 483 U.S. at 207 (quoting United States v. Butler, 297 U.S. 1, 65-66 (1936)). The Supreme Court accordingly has rejected the claim that enforcing the conditions of assistance under Title I of the ESEA would violate the Tenth Amendment: “Requiring States to honor the obligations voluntarily assumed as a condition of [Title I] federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty.” Bell, 461 U.S. at 790; see also South Dakota, 483 U.S. at 210 (“[A] perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants.”); Oklahoma v. Civil Service Commission, 330 U.S. 127, 143-44 (1947) (condition of assistance that intruded on an area where the federal government ordinarily “has no power to regulate” did not violate the Tenth Amendment because the state may adopt “the ‘simple expedient’ of not yielding to what [the state] urges is federal coercion”); Padavan v. United States, 82 F.3d 23, 29 (2^d Cir. 1996) (Medicaid’s directive to states to provide health services to illegal immigrants does not violate the Tenth Amendment because “Medicaid is a voluntary program in which states are free to choose whether to participate”); Counsel v. Dow, 849 F.2d 731, 738 (2^d Cir. 1988) (federal government may exercise Spending Clause authority in the area of “education – a ‘sovereign state function’” without violating Tenth Amendment).

The State further alleges that “[t]he Secretary’s penalties for not complying” with the NCLB’s conditions of assistance “are so harsh and unrelated to the conditions upon which the State accepted the funds that they violate the Tenth Amendment.” Complaint ¶ 102.¹⁷ Although

¹⁷ Those penalties, as described in the State’s Complaint, may include “cut[ting] or eliminat[ing] all of a State’s Title I funding” as well as any other federal educational funding “that relied upon the Title I formula.” Complaint ¶¶ 33, 35.

the legal basis of this constitutional claim is not clear, the State may be referring to certain comments in Supreme Court decisions to the effect that, “in some circumstances[,] the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.” South Dakota, 483 U.S. at 211. This dicta, however, cannot save the State’s Tenth Amendment claim. As the U.S. Court of Appeals for the Tenth Circuit noted in addressing a “coercion” claim brought by the state of Kansas (which stood to lose \$130 million in federal assistance if it did not comply with certain requirements established by the Personal Responsibility and Work Opportunity Reconciliation Act):

[T]he cursory statements in Steward Machine and Dole mark the extent of the Supreme Court’s discussion of a coercion theory. The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it. . . .

The boundary between incentive and coercion has never been made clear, and courts have found no coercion in situations where similarly large amounts of federal money [\$130 million] were at stake. For example, numerous courts have upheld conditions on Medicaid grants even where the removal of Medicaid funding would devastate the state’s medical system. . . .

In any event, the coercion theory is unclear, suspect, and has little precedent to support its application. Indeed, in Steward Machine, the first case to articulate the coercion theory, the Court minimized its force, observing, “to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.”

Kansas v. United States, 214 F.3d 1196, 1201-02 (10th Cir. 2000) (internal citations omitted).

The U.S. Court of Appeals for the D.C. Circuit reached a similar conclusion when confronted with a claim that the threat of losing all federal Medicaid funding was “coercive,” observing that “[t]he courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice We therefore follow the lead of other courts that

have explicitly declined to enter this thicket when similar funding conditions have been at issue.” Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981); see also California v. United States, 104 F.3d 1086 (9th Cir. 1997) (noting, in upholding allegedly “coercive” conditions of assistance under Medicaid, that “[t]he difficulty if not the impropriety of making judicial judgments regarding a state’s financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments”). This Court should be no more receptive to the ill-defined and philosophically fraught “coercion” theory than other federal courts have been in situations where the stakes were equally high.

IV. The Secretary’s Exercise of Discretion in Denying the State’s Waiver Requests Is Not Subject to Judicial Review

The State’s third claim is that the Secretary’s decisions to deny three of the State’s waiver requests “are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority or limit, or short of statutory right.” Complaint ¶ 106. This language tracks the first three grounds for setting aside a final agency action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). Plaintiffs’ Complaint alleges that the Secretary’s denial of the State’s waiver requests constitutes “final decisions of an administrative agency,” Complaint ¶ 104, and that the Court has jurisdiction over this claim pursuant to 5 U.S.C. § 704. See Complaint ¶ 13.

The Court lacks jurisdiction over this claim. Section 704 of the APA provides for judicial review of “final agency action for which there is no other adequate remedy in court.” 5 U.S.C. § 704. Assuming *arguendo* that a final agency action has occurred, see Part I.B., supra, that is not sufficient to establish jurisdiction. Under the APA, “before any review at all may be

had, a party must first clear the hurdle of § 701(a).” Heckler v. Chaney, 470 U.S. 821, 828 (1984). Section 701(a) provides that the judicial review provisions of the APA are applicable “except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). Under the latter exception, “even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” Chaney, 470 U.S. at 830. Agency action therefore is unreviewable where the governing statute “sets forth no factors that the [agency] must consider or abide by” in making a particular decision. Greater New York Hosp. Assoc. v. Mathews, 536 F.2d 494, 497 (2^d Cir. 1976). By corollary, a party seeking to challenge an agency action “must specify some statute or regulation that would limit the [agency’s] discretion.” Lunney v. United States, 319 F.3d 550, 558 (2^d Cir. 2003).

The State can cite no such statute or regulation in this case. The NCLB leaves the decision whether to grant or deny waiver requests entirely to the discretion of the Secretary:

Except as provided in subsection (c) of this section, the Secretary *may waive* any statutory or regulatory requirement of this chapter for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that –

- (1) receives funds under a program authorized by this chapter; and
- (2) requests a waiver under subsection (b) of this section.

20 U.S.C. § 7861(a) (emphasis added). No standards for the exercise of this discretion are articulated; as long as the waiver request contains the information specified in subsection (b) and does not request a waiver of one of the provisions listed in subsection (c), the Secretary is free to grant or deny the request as she sees fit. This unfettered discretion stands in stark contrast to the

Secretary's authority to renew waivers after an initial four-year period, which the Secretary may do only "if the Secretary determines that (A) the waiver has been effective in enabling the State or affected recipient to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement; and (B) the extension is in the public interest." 20 U.S.C. § 7861(d)(2) (emphasis added). Nor are there any regulations that would provide a basis for evaluating the agency's exercise of discretion. Although the Secretary has promulgated regulations that contain detailed requirements for the agency's administration of many provisions of the NCLB, they establish no standards for the Secretary's exercise of discretion to grant or deny a waiver request. See 68 Fed. Reg. 68698-01 (Dec. 9, 2003); 67 Fed. Reg. 71710 (Dec. 2, 2002); 67 Fed. Reg. 45038 (July 5, 2002); 34 C.F.R. Part 200.

The absence of any standards in the statute or regulations governing the agency's consideration of a waiver request is consistent with the nature of the agency action at issue. "There is a point at which the nature of administrative decisions is such that they should be treated as committed to agency discretion because they are simply not subject to judicial evaluation." Greater New York Hosp. Ass'n, 536 U.S. at 498. Accordingly, the Supreme Court has read § 701(a)(2) to preclude judicial review, not only of particular agency actions, but of "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" Lincoln v. Vigil, 508 U.S. 182, 191 (1993). The agency actions that fall within these categories generally require "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," e.g., how "resources are best spent"; whether an action "is likely to succeed" in fulfilling the relevant statutory mandate; and whether a particular decision "best fits the agency's overall priorities." Id. at 193 (citing

Chaney, 470 U.S. at 831).¹⁸ Examples of such categories of agency action that are presumptively exempt from judicial review include decisions whether to take enforcement action, decisions whether to grant reconsideration of an agency action because of “material error,” decisions to terminate employees for national security reasons, and the allocation of funds from a lump-sum appropriation. See Lincoln, 508 U.S. at 191-92.

The Secretary’s decision not to grant a waiver from the NCLB’s requirements, like an enforcement decision or a decision to allocate lump-sum funds, “should be treated as committed to agency discretion because [it is] simply not subject to judicial evaluation.” Greater New York Hosp. Ass’n, 536 U.S. at 498. The decision is fundamentally a matter of educational policy and priorities. It has long been recognized that “courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.” Board of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982) (internal quotation marks and citation omitted). Such specialized knowledge and experience is critical, because “[e]ducation, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems.” San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973). As stated by the Supreme Court:

On even the most basic questions in this area the scholars and educational experts are divided. . . . [O]ne of the major sources of controversy concerns the extent to

¹⁸ Courts have identified several other factors that may be considered in determining whether a particular agency action is susceptible to judicial review, many of which are present in this case and weigh against review: “the impact of review on agency effectiveness”; “[the] breadth of discretion granted and the extent of agency expertise involved”; “the managerial nature of the agency’s responsibilities”; “the flood of appeals that would result if this type of action were reviewable”; “the practical requirements of the task to be performed”; and “whether the subject matter is appropriate for judicial review.” New York Racing Ass’n v. NLRB, 708 F.2d 46, 51 (2^d Cir. 1983) (summarizing holdings of other cases).

which there is a demonstrable correlation between educational expenditures and the quality of education Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing . . . restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

Id. at 42-43. Although this passage was intended to discourage courts from interfering in states' administration of their own educational schemes, the same principle counsels against interference with the Secretary's administration of the federal educational scheme that she is charged with administering. Because the decision whether to grant or deny a waiver "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," Chaney, 470 U.S. at 831, it is the type of decision that is ill-suited to judicial review. For this reason, in addition to the lack of any statutory or regulatory standards to apply, judicial review is unavailable under the APA.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that the Court dismiss the Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2005, a copy of the foregoing Memorandum in Support of Defendant's Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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